IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 354 of 2001

For Approval and Signature:

HON'BLE MR.JUSTICE J.R.VORA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

---

HARIBHAI MANGALBHAI

Versus

STATE OF GUJARAT

---

Appearance:

1. Criminal Appeal No. 354 of 2001

MS SADHANA SAGAR for Appellant No.

THROUGH JAIL for Appellant No.

MR HL JANI Ld. APP for Respondent No. 1

---

CORAM : HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 27/09/2004

ORAL JUDGEMENT

1. This appeal is preferred under sec. 374(2) of

the Criminal Procedure Code, against the judgment and order delivered by the 3rd Jt. District Judge & Addl. Sessions Judge, Kheda, camp at Anand on 18.4.2001 in Sessions Case No. 223/1999, whereby the ld. trial judge convicted the appellant for the offence proved against him under sec. 304 Part-II and sentenced him to undergo R/I for 7 years and to pay fine of Rs. 1000/-, in default, to undergo S/I for 3 months.

2. The incident in question took place on 26.2.1999 in the evening at about 6.00 O'clock. Victim of the incident Shardaben, wife of the present appellant, had married to the appellant for about 12 years before the incident. Both of them were residing at village Adas and had one son aged 4 years. For last three days previous to incident, appellant-husband was picking up quarrels with wife deceased Shardaben about preparing meals. On the day of incident, appellant had been to labour work and returned to the house at about 6.00pm. Deceased Shardaben had prepared "Khichadi" for supper. The appellant demanded Rs. 50/- from Sharda, but she had no money. She conveyed to her husband that she had no money and on hearing this, appellant told her to bring money from her father, else, he would burn her. Therefore, she went in kitchen. She did not take utterance of appellant seriously and thought that appellant was venting bad temper. Her husbnad followed her in the kitchen and administered 2 - 3 slaps, and thereafter, from a tin which was lying nearby, poured kerosene over Shardaben and ignited her by match stick. The clothes of Shardaben got flames and her body was also burnt. She started shouting for help, and on hearing this, present appellant - her husband ran away from the house. Hearing shouts of Shardaben, Savitaben Ravajibhai Makwana and Budha Desai Makwana, who were residing near the house of the deceased came to rescue her and by putting quilt on the body of deceased attempted to extinguish the fire. Shardaben went in unconsciousness and regain consciousness at about 12.00 O'clock in the night. Her both hands, chest and throat including back side were burnt. Whole night she stayed at home, but her husband i.e. present appellant did not return. Through her brother-in-law on next day, she conveyed message to her parents at village Anklav. Her parents on receiving the message came to village Adas and Shardaben informed them about the incident. Her parents took her to Vasad Police Station where she lodged her complaint at 10.45 AM on 27.2.1999. She was sent to Karmsad Medical College and Krishna Hospital at Karamsad, where she was examined by PW-5 Dr. Nayanjit Apurva Chaudhary where she gave history that her husband ignited her after pouring kerosene. According to Dr. Nayanjit,

she had 27% burnt injuries. On 27.2.1999 in pursuance of Yadi a by Vasad Police Station, Executive Magistrate Indravadan Purshottambhai Trivedi recorded dying declaration of the deceased at about 12.30 noon. Before the Executive Magistrate, she stated that her husband demanded Rs. 50/- from her, and on refusal to give money, she was burnt by her husband. In police yadi which Executive Magistrate received, there was an endorsement of Doctor that the patient was conscious and was able to identify person and was in a position to recognise that where she was kept. During treatment, on 23.6.1999 Shardaben died and after due investigation, a charge-sheet for the offence under sec. 498-A and 302 of Indian Penal Code was filed in the Court of ld. Judicial Magistrate First Class against appellant. The case, in turn, came to be committed to the Court of Sessions at Nadiad. Vide ex. 3, on 17.7.2000, ld. Addl. Sessions Judge, camp at Anand, framed charges against the present appellant for the offence punishable under sec. 498-A and 302 of Indian Penal Code. Appellant pleaded not guilty and hence, prosecution examined as many as 10 witnesses and produced on reocrd other documentary evidence. Complainant Gamalsinh, father of the deceased is examined at ex. 7, but he has not supported the prosecution case. Executive Magistrate - Indravadan Purshottambhai Trivedi is examined at ex. 9 and he stated that he recorded the dying declaration of deceased shardaben which he produced at ex. 11. He proved in his substantive evidence dying declaration at ex. 11. Dr.Subhashchandra Jethanand Ramani has been examined by the prosecution at ex. 12, who performed post mortem of deceased and according to him, the cause of death was shock due to burns. Circle Inspector Ranjitsinh Punambhai Solanki who has been examined at ex. 16 as PW-4, has produced map of scene of offence on record. PW-5 Ex. 18 Dr. Nayanjit Apurva Chaudhary examined deceased Shardaben at Karamsad Hospital first in point of time and vide his substantive evidence at ex. 18, he stated that deceased had given the history that her husband ( present appellant ) ignited her and 27% burns injuries were found on the body of the deceased. PW-7, Ex.20 Panch witness Udesinh Gambhirsinh Mahida has not supported the panchana of scene of offence. Other panch witnesses Ex. 26 Vallabh Maganbhai Chavda and Ex. 28 Bhailal Khumansinh are examined to prove the panchanama Ex. 27 in respect of phyisical condition of deceased but none of them supported the prosecution case. PW-9 Pyarasha Fatesinh Bhalava is examined at Ex. 31 as a panch of inquest panchanama but he also has not supported the prosecution case. Lastly, as PW-10 Investigating Officer, P.S.I. Kishorsinh B. Jadeja of Vasad Police

Station has been examined by the prosecution at ex. 33. In addition to this, prosecution also submitted documents on record like panchanama of scene of offence, complaint given by deceased, inquest panchanama, post mortem note, injury certificate of deceased and FSL report.

3. After the evidence was over, a statement of the accused-appellant was recorded by the ld. trial judge as per sec. 313 of the Code of Criminal Procedure, wherein he denied the circumstances appearing against him in the evidence recorded and stated that he did not know anything about incident and stated that on the contrary, on knowing about the incident, Savitaben reached at his residence first and thereafter he reached to his residence. In his support, he requested the court to examined two witnesses as court witnesses and his request was granted under sec. 311 of the Code of Criminal Procedure. Court witness No. 1 - Dr. Nareshkumar Govindlal Bhalja was examined at ex. 41 to prove that he also had received injuries in the incident. Dr. Nareshkumar Govindlal Bhalja stated in his deposition that on 2.3.1999, he examined appellant with police yadi and had ordinary burns injuries. Likewise, the other court witness Savitaben Ravajibhai is also examined at ex. 45 and stated that at the time of incident, she was busy with her house hold work. ON hearing commotion and hearing shouting from Shardaben, she reached at her residence and put on quilts on the body of Shardaben to extinguish the fire. At that time, she and accused were present. The appellant also attempted to extinguish the fire.

4. After hearing both the parties, ld. trial judge came to the conclusion that though it is proved that the incident has occurred as stated by the complainant which is proved beyond doubt through unimpeachable evidence like dying declaration etc. but the appellant could not be held guilty for the offence punishable under sec. 302 of Indian Penal Code. Ld. trial judge after appreciating the circumstances of the case came to the conclusion that the incident was followed by demand of money and, therefore, there may not be intention of the appellant - accused to commit murder of Shardaben and hence, the ld. trial judge convicted the appellant-accused for the charge proved against him under Sec. 304 Part-II and sentenced him to undergo imprisonment of 7 years and to pay fine of Rs. 1000/-. It appears that appellant is acquitted of the charges under sec. 498(A) of Indian Penal Code levelled against him.

5. Ld. advocate Ms. Shadhna Sagar for appellant and ld. APP Mr. HL Jani for the State, were heard.

6. In this appeal, ld. advocate for the appellant restricted her contentions in respect of quantum of sentence only and no contention on merits of the matter was advanced. It was contended by the ld. advocate for the appellant that the appellant is today aged about 52 years. At the time of incident, he had a son aged about 4 years. He has been convicted for the offence proved against him under sec. 304 Part-II. It was also stated that almost, the appellant is on verge of completing the sentence of imprisonment of 7 years. The appellant is poor and belongs to labour class. During trial also, he was under custody and, thereafter, he has not been released either on parole, temporary bail or furlough at any time. Ld. advocate for the appellant stated that including remission, the appellant has undergone almost 6 years, 6 months and some days imprisonment including the set-off and remission. It was urged that this is sufficient punishment awarded to the appellant, and the sentence of imprisonment awarded to the appellant is required to be reduced to the period he has already undergone.

7. Since no contentions are raised on merits of the appeal, the matter is now required to be decided with reference to limited issue of quantum of punishment. Though I have carefully gone through the evidence recorded of each of 10 witnesses and the documents produced. On dispassionate scrutiny and re-appreication of the evidence tendered by the prosecution, it is clear that the finding of the ld. trial judge about guilt of the appellant-accused cannot be interfered with in this appeal. Conviction of the appellant under sec. 304 Part-II instead of under sec. 302 of Indian Penal Code and acquittal of the appellant for the charge under sec. 498-A of the Indian Penal Code, is not the subject matter of any acquittal appeal filed by the State Government. In these circumstances, even otherwise, no interference in the findings and conclusion of the ld. trial judge is required.

8. At the same time, contention for interference in the quantum of punishment is certainly required to be taken into consideration. Record reveals that the appellant belongs to labour class and he is very poor. He has one son who was aged 4 years at the time of incident. His son may be of aged about 10 to 11 years today. As being father, is required to take care of his son in absence of mother of the child. Above all, the

jail remarks produced on record denotes that after conviction, the appellant is served with the punishment for 3 years, 5 months and 2 days. He has been given set-off of 2 years, 1 month and 17 days for which period he was undertrial prisoner. The appellant has earned remission of 11 months and 16 days. So, today, out of substantive sentence of 7 years as awarded by the ld. trial judge, the appellant has undergone almost imprisonment of 6 years, 6 months and some days. There is no appeal from the State Government for enhancement of the sentence. In this circumstances, the contention raised on behalf of the appellant for reduction of quantum of sentence is required to be accepted because early release of the appellant from the jail may provide him an opportunity to reform himself and to live as law abiding citizen. The purpose of punishment deterrent as well as reformative, both will be served if the appellant is released after serving of punishment to the extent of 6 years, 6 months and some days when he has sentenced to undergo in all 7 years imprisonment and fine of Rs. 1000/-, in default, to undergo imprisonment of three months.

9. In the above view of the matter, punishment awarded by the ld. trial judge to the appellant accused is required to be reduced to the extent of undergone and while dismissing the rest of the appeal of the appellant, the quantum of punishment is reduced.

10. This appeal is partly allowed only to the extent of reduction of quantum of sentence awarded by the ld. Trial Judge to the appellant and rest of the whole appeal of the appellant stands dismissed. While dismissing rest of the appeal of the appellant, quantum of sentence is modified to the extent that the sentence awarded by the ld. Trial Judge of 7 years imprisonment and fine of Rs. 1000/-, in default, to undergo 3 months imprisonment is substituted by punishment of imprisonment which the appellant has already undergone and which comes to 6 years, 6 months and some days, as stated above. Fine if paid by the appellant, be refunded to him. Muddamal be disposed of as directed by the ld. Trial Judge. The appellant is directed to be released from the jail forthwith, if he is not required to be detained in jail for any other purpose.

(J.R. VORA, J.)
mandora/